Supreme Court, U.S.
FILED

992066 JUN 23 2000

OFFICE OF THE CLERK

(2)

No. _____

In the
Supreme Court of the United States
_____ Term, 1999-2000

ROBERT A. BROWN, et al,,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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72 pp

APPENDIX A –
RULING ON PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED: March 30, 2000
Cathy A. Catterson, Clerk,
U.S. Court of Appeals

No. 99-15308
D.C. No. CV No. CV-98-00825-PMP
Southern Nevada

ROBERT A. BROWN, ELENA H. BROWN,
Plaintiff-Appellants,
v.
UNITED STATES OF AMERICA,
Defendant-Appellee

ORDER

Before: BROWING, WALLACE AND LEAVY,
Circuit Judges.

The panel has voted to deny appellants' motion for publication of the Memorandum Disposition and to deny the petition for panel rehearing. Judge Browning has voted to deny the petition for rehearing en banc, and Judges Wallace and Leavy so recommend.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P.35.

The motion for publication, the petition for panel rehearing and the petition for rehearing en banc are denied.

APPENDIX B –
PETITIONER'S REQUEST THAT THE COURT OF APPEALS CERTIFY WHETHER OR NOT IT HAD ADDRESSED THE CONSTITUTIONAL VIOLATIONS RAISED ON APPEAL

CASE NO 99-15308

Lower Court Docket No. CV-98-00825-PMP

ROBERT A. AND ELENA H. BROWN

Appellant/Petitioners

vs.

UNITED STATES OF AMERICA

Defendant / Appellees

SUPPLEMENT

TO APPELLANT/PETITIONERS' PETITION FOR REHEARING PURSUANT TO FRAP 40 AND/OR FOR A REHEARING EN BANC PURSUANT TO FRAP 35 AND MOTION THAT THE COURT'S RULING OF OCTOBER 26, 1999 BE PUBLISHED

COMES NOW Appellant/Petitioners in the above action and requests that if this Court denies the relief requested in the above petition, then the Ninth Circuit, en banc, certify to the Supreme Court whether or not it has addressed the constitutional violations raised and set forth by Appellant/Petitioners in their appeal.

Respectfully submitted,

_____

Robert A. Brown, Pro per
1046 Howard Drive
Las Vegas, Nevada 89104

APPENDIX C –
DECISION BY COURT OF APPEALS OF
OCTOBER 26, 1999

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED: October 26 1999
Cathy A. Catterson, Clerk,
U.S. Court of Appeals

No. 99-15208
D.C. No CV No. CV-98-00825-PMP

ROBERT A. BROWN, ELENA H. BROWN,
Plaintiff-Appellants,
v.
UNITED STATES OF AMERICA,
Defendant-Appellee

Appeal from the United States District Court
for the District of Nevada
Philip M. Pro, District Judge Presiding

MEMORANDUM[1]

Submitted October 18, 1999[2]
Before: BROWING, WALLACE AND LEAVY,
Circuit Judges.

Robert and Elena Brown appeal pro se the district court's summary judgment for the United States

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[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit as may be provided by 9th Cir. R. 36-3

[2] The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P 34(a)(2)

in the Brown's action seeking a refund of taxes paid for tax year 1996 on the ground the IRS had failed to make any assessment against them and they had no tax liability.

These arguments are frivolous. First, the Sixteenth Amendment authorizes a direct non-apportioned income tax on resident United States citizens. *See Wilcox v. Commissioner*, 848 F.2d 1007,1008n.3 (9th Cir. 1988). Second, compensation for labor or services, paid in the form of wages or salary, is income subject to taxation. *See United States v. Romero*, 640 F.2d 1014,1016 (9th Cir.1981). The Browns are taxpayers within the meaning of the Internal Revenue Code and are subject to federal tax laws and income tax. *See id.*

Third, there is no requirement that the IRS make a formal assessment of tax liability before payment is necessary. An assessment is merely a bookkeeping procedure that permits the government to bring its administrative apparatus to bear in collecting a tax. *See Zeier v. United States,* 80 F.3d 1360, 1354 (9th Cir. 1996) (rejecting similar argument in estate tax context). Most taxes are collected voluntarily, without an assessment; an assessment serves as the basis on which the IRS takes action against those who do not voluntarily pay their taxes on time. *See id.*

Accordingly, the judgment of the district court is **AFFIRMED.**

APPENDIX D –
ORDER OF DISTRICT COURT OF
JANUARY 19, 1999

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ENTERED AND SERVED
JAN 21 1999
CLERK U.S. DISTRICT COURT
DISTRICT OF NEVADA

D.C. No CV No. CV-98-00825-PMP (RJJ)

ROBERT A. BROWN,
ELENA H. BROWN,
Plaintiffs,

v.

UNITED STATES OF AMERICA,
Defendant.

ORDER

This action was commenced on May 29, 1998, by the filing of Plaintiffs' Complaint to recover overpayment of federal income taxes for the year 1996 (#1).

On November 30,1998, Plaintiffs filed a Motion for Summary Judgment (#12). On December 14, 1998, Defendant United States filed a Response in opposition to Plaintiffs' Motion for Summary Judgment and Defendant's Cross-Motion for Summary Judgment (#13-#15). On January 6, 1999, Plaintiffs filed a Reply to Defendant's Opposition to Plaintiffs' Motion for Summary Judgment and Cross-Motion for Summary

Judgment (#16).

The pleadings and Motions on file, and particularly the Form W-2's submitted as exhibits to Defendant United States' Cross-Motion for Summary Judgment (#15), unambiguously show that Plaintiffs Robert A. Brown and Elena H. Brown received the sums of $23,846.73 and $20,354.42, respectively, for the year 1996 and that a total of $5,035.50 was withheld for that year. Plaintiffs' suit for refund is grounded in the claim that because no assessment had been made against them with regard to income taxes at the time they filed their income tax return, Form 1049 (sic), for the year 1996, they are entitled to a full refund of the entire amount of the taxes withheld. Plaintiffs are wrong.

The absence of a tax assessment by the Internal Revenue Service does not prove that a taxpayer owes no taxes. See 26 U.S.C. par. 6151 and *Moran v. U.S.*, 63 F. 3d 663, 666 (7th Cir. 1995). Indeed, the undisputed facts before the Court demonstrate that Plaintiffs cannot prove their claim of overpayment and entitlement to refund.

IT IS THEREFORE ORDERED that Plaintiffs' Motion for Summary Judgment (#12) is denied.

IT IS FURTHER ORDERED that Defendant United States' Cross-Motion for Summary Judgment (#13-#15) is granted and that Judgment is hereby entered in favor of Defendant United States and against Plaintiffs Robert A. Brown and Elena H. Brown.

DATED: January 19, 1999

PHILIP M. PRO
United States District Judge

APPENDIX E –
PLAINTIFF/APPELLANTS' PETITION THAT THE NINTH CIRCUIT RECONSIDER ITS DECISION OF OCTOBER 26, 1999

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CASE NO 99-15308
Lower Court Docket No. CV-98-00825-PMP

ROBERT A. AND ELENA H. BROWN

Appellant/Petitioners
vs.

UNITED STATES OF AMERICA
Defendants - Appellees

PETITION FOR REHEARING PURSUANT TO FRAP 40 AND/ OR FOR A REHEARING EN BANC PURSUANT TO FRAP 35 AND MOTION THAT THE COURT'S RULING OF OCTOBER 26, 1999 BE PUBLISHED

Plaintiff-Appellants would ask this Honorable Court to reconsider its Decision filed on October 26, 1999 in which it affirmed the lower court's granting of a summary judgment to the United States. At the very least the panel should reconsider its decision pursuant to FRAP 40, and if the panel will not reverse its Ruling pursuant to FRAP 40, than en banc consideration is warranted, because the Panel's decision conflicts with numerous Supreme Court and lower courts decisions (to numerous to mention) all of which holding that assessments of an ad valorem income tax is a condition precedent to the owing of any such tax.[1] The Court's ruling of October 26, 1999

is also in conflict with at least 40 provisions of the Internal Revenue Code which mandate assessments, as well as Section 31(a)(1) of the Internal Revenue *Code, to say nothing* of numerous Treasury Department regulations and IRS procedure manuals mandating the making of assessments. The Court's ruling is also in direct and obvious conflict with the apportionment provisions of the United States Constitution. Therefore, en banc consideration is necessary in order to bring this 9th Circuit decision into conformity with both law and reason and to maintain and preserve the reputation of the 9th Circuit as being a court of law and not merely a Star Chamber. It is also obvious that the Panel knows that its decision is in conflict with both law and reason which is why it seeks to hide its decision by refusing to publish it. The Panel correctly understands that a published decision of this Circuit in which the 9th Circuit claims that income taxes (as well as other ad valorem taxes) can be owed absent assessments, would throw tax law in the 9th Circuit into total chaos while causing tax lawyers all over the country to scratch their heads in disbelief.

In rendering their decision the Honorable James Browning, Clifford Wallace and Edward Leavy blatantly disregarded numerous statutes contained in the Internal Revenue Code, as well as numerous, relevant Supreme Court decisions. The panel also blatantly ignored and disregarded the apportionment provisions of the United States Constitution especially as they apply to the ***wage tax*** imposed in Code Section 3402 and to the $5,035.57 at issue.

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[1] "An ad valorem tax is imposed ***only by assessment*** – an assessment being a prerequisite to the existence of the tax" (Emphasis added) *U. S. v. Marion Trust*, 143 F.Rep 301, 302. (7th Cir. 1906).

The facts in this case are simple. Plaintiffs paid $5,035.57 in wage taxes as imposed in Code Section 3402. This amount was fraudulently collected by the defendant in the guise of "Income tax collected at source" as Code Section 3402 is fraudulently captioned. Apart from the wording of the statute itself, Code Section 6413 clearly identifies that a wage tax is "imposed" in Code Section 3402, having nothing to do with the income tax imposed in Section 1. [2] Code Section 6413 states in relevant part that:

> If more than the correct amount of tax ***imposed by section*** 3101, 3111, 3201, 3221, or ***3402*** is paid etc. etc. etc." (Emphasis added)

Clearly, therefore, a wage tax is imposed in Code Section 3402, having nothing to do with the income tax imposed in Code Section 1 or the 16th Amendment. Plaintiffs extensively briefed both the trial court and this Court that a direct, tax on wages as imposed in Code Section 3402 would be an obvious violation of the apportionment provisions of the Constitution as contained in Article 1, Sections 2 and 9, Clauses 3 and 4 – if it were not refundable as provided for in Code Section 31(a)(1). Plaintiff also extensively briefed both the trial court and the Ninth Circuit on appeal that an unapportioned, direct tax imposed directly on wages was obviously unconstitutional. Plaintiff pointed out in his pleadings to both courts that a tax imposed directly on a "source" of income (such as wages) had to be apportioned, as the Supreme Court

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[2] Since the only "authorities" cited by the 9th Circuit Panel as support for its decision were three appellate decisions having nothing to do with the wage tax imposed in Code Section 3402, the Appellate Panel relied on no authority that would allow it to deny plaintiff the refund clearly provided by Code Sections 3402 and 31(a)(1) – overlooking all of the other considerations that establish plaintiff's right to a refund of the funds at issue.

clearly ruled in *Brushaber v. Union Pacific RR*, 240 US 1, and *Pollock v. Farmers Loan & Trust*, 158 U.S., 158 U.S. 601. [3] In upholding the lower court's granting of a summary judgment to the Government, the Ninth Circuit (following the lead of the trial court) ignored both the apportionment provisions of the Constitution and the *Brushaber* and *Pollock* decisions.

In addition to ignoring the above statutes and Supreme Court decisions, both the trial court and the 9th Circuit panel also ignored the provisions of Code Section 31(a)(1). This statute provides that:

> The amount withheld, as a tax under chapter 24 (which includes Code Section 3402) shall be allowed to the recipient of the income as a credit against the tax imposed by this title.

In filing their 1996 income tax return, plaintiffs-appellants showed a "zero" as the amount of income taxes they claimed was due and owing. Therefore based on the provisions of Code Section 3402 and 31(a)(1), the "credit" they were entitled to, had to take the form of a cash refund of the $5,035 the Defendant was holding. Clearly, pursuant to the provisions of Code Section 6501(c)(1) it can not be contended by either the trial court nor the 9th Circuit Court of Appeals that as of the date plaintiffs-appellants filed their 1996 income tax return and claim for refund that they owed more in income taxes than the "zero" shown on their 1996 tax return. Code Section 6501(c)(1) provides that:

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[3] Since this issue was extensively covered in plaintiff's underlying pleadings, plaintiff feels no need to rehash this entire issue in this Motion for Reconsideration. It's all there in plaintiffs-appellants underlying pleadings.

> In the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed or a proceeding in court for collection of such tax may be begun without assessment at any time.

Therefore, **unless** and ***until*** the Government assessed an amount of income taxes against plaintiffs-appellants (in excess of the "zero" shown on their return) as being due and owing for 1996, or secured a judgment against them for a greater amount, as a result of a "proceeding in court," as provided for in Code Section 6501(c)(1) it can not be contended by this or any other court that plaintiffs-appellants owed more in 1996 income taxes than the "zero" shown on their 1996 income tax return.

Therefore any claim by the Government or any Court that as of the date that plaintiffs-appellants filed their 1996 return and claim for refund, that they owed more than the "zero" shown on their return, would amount to a blatant and deliberate violation of Code Section 6501(c)(1). It is clear, that if a federal court were to rule that plaintiffs-appellants owed more in income taxes than the "zero" shown on their 1996 income tax, despite the fact that no assessment nor any judgment for any greater amount then "zero" exists against them, then that court would also have ruled that Code Section 6501 (c)(1) is without legal force and effect.[4]

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[4] It is also clear that if this Court were to deny plaintiff the protection of 6501 as well as the many other protections afforded him by the assessment provisions of the Internal Revenue Code and the apportionment provisions of the Constitution, such a denial by this Court would not only amount to a clear cut case of obstruction of justice, but an obvious criminal violation of 18 USC 241.

SECTION 6151

In granting the Government a summary judgment, Judge Pro, the trial court judge, relied on Code Section 6151(a). However, as was fully developed in plaintiff's Opening Brief, it is clear that Section 6151 has nothing whatever to do with the payment of income taxes. Plaintiff pointed out in his Opening Brief that:

> 1) If Code Section 6151 were relevant to the payment of income taxes, it would have been identified as such in the Privacy Act Notice as contained in the 1040 booklet. However only Code Sections 6001, 6011 and 6012 are identified in that Notice as being relevant to the payment of income taxes.
>
> 2) In addition, plaintiff supplied this Court (as Exhibit F) an excerpt from the Parallel Table of Authorities which showed that the implementing regulation for this statute is in 27 CFR, not in 26 CFR. This proved that 6151 only related to the payment of liquor, tobacco and firearms, not to the payment of income taxes.

Therefore it is clear that Judge Pro's underlying ruling was erroneous as a matter of law.

THE COURT'S RULING OF OCTOBER 26 IS TOTALLY LAWLESS

In sustaining Judge Pro's decision the 9th Circuit stated that "There is no requirement that the IRS make a formal assessment of tax liability before payment is necessary." In making this claim (which renders meaningless over 40 Code Sections mandating

the making of assessments) the 9th Circuit cites no statute to back up its claim. It does not even cite Code Section 6151; the Code Section relied upon by Judge Pro in making this same claim. It is instructive to note that in its two page decision the 9th Circuit panel ***does not cite one statute*** to support its claim that assessments are unnecessary in establishing whether one owes income taxes or not. Thus plaintiff can claim without fear of contradiction that the panel's decision ***was totally lawless.*** [5] In making such an unsupported claim that assessments are legally meaningless, the Ninth Circuit has ruled that the Government can seize property without bothering to make the assessments called for by such statutes as Code Sections 6201, 6203, 6213, 6214, 6215, 6225, 6303, 6322, 6501, 6851, and 6852, to name only 11 of the some 40 statutes that mandate the making of assessments in a variety of circumstances. In holding that assessments are not legally necessary, the 9th circle panel has managed TO STAND THE ENTIRE INTERNAL REVENUE CODE ON ITS HEAD. If income taxes can be owed absent assessments, on what date do they become due and owing and who makes such a determination? Apparently laws as passed by the U.S. Congress do not impress this 9th Circuit panel.

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[5] Since Article 1, Section 1 of the Constitution states that "All legislative powers herein granted shall be vested in a Congress of the United States," and since Congress never passed a law binding Americans to court decisions in which they took no part, the three Appellate Court decisions cited by the Panel are not binding on plaintiff. What are binding on plaintiff and this Court are the statutes and the legislative regulations issued by the Treasury Department. So what the Panel has done in this instance, is to ignore the law , Treasury regulations, and the Constitution and has sought to enforce *as law* the erroneous and non – binding opinions of other federal judges, who apparently labor under the same misconceptions as the instant Panel.

THE NINTH CIRCUIT DECISION IGNORES NUMEROUS SUPREME COURT DECISIONS THAT ARE BINDING ON THE 9TH CIRCUIT

In holding that income taxes can be owed absent assessments, the Ninth Circuit decision not only flies in the face of the statutes enumerated above and common sense (since if assessments serve no legal purpose, why provide for them at all?), but it also flies in the face of Supreme Court decisions that are binding on the 9th Circuit. For example in ***Bull v. U.S.*** 295 U.S. 247, 249, the Supreme Court held,

> Once the tax is assessed. The taxpayer will owe the sovereign the amount when the date fixed by law for payment arrives.

If income taxes can be owed absent assessments, then the above holding by the Supreme Court makes no sense at all. Clearly the 9th Circuit Panel simply decided to ignore this holding of the Supreme Court.

In ***Rosenman v. U.S., 323 U.S. 658, 663***, the Supreme Court pointed out, with respect to taxes paid before they are assessed, that:

> The Government does not consider such advances of estimated taxes as payments. They are, as it were, payments in escrow. They are set aside, as we have noted, in special suspense accounts, established for depositing money *received* ***when no assessment is then outstanding*** *against the payment.* The receipt by the Government of moneys under such an arrangement [i.e. when no assessment has been made] carries no more signifi-

> cance than would the giving of a surety bond. Money in these accounts is held not as taxes duly collected are held but as a deposit made in the nature of a cash bond for the payment of taxes thereafter found to be due [and assessed]. (Emphasis and bracketed material added)

So here we have the Supreme Court again acknowledging that taxes paid prior to assessments having been made can not even be considered as money paid for taxes owed, but are in fact money "set aside" as "payments in escrow" until such taxes are "owed" - which, of course, can only come about through assessments or a proceeding in court.

There are, of course, numerous court decisions acknowledging that assessments are a condition precedent to the owing of income taxes as, for example, ***G.M. Leasing v. United States***, 429 US 338 (1977). In this case, parties to the litigation paid $280,000 in *estimated* income taxes. In connection with this *estimated* payment the Supreme Court said, at page 341:

> The sum of 289,800[6] was transmitted when the form was filed and was placed by the Internal Revenue Service *in a suspense account for future credit.* (Emphasis added)

So the advance, *estimated* income tax payment was placed in a "suspense account" pending the assessment against which it would eventually be credited - as is more fully described in ***Rosenman,*** supra.

Additional quotations from ***G. M Leasing*** show-

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[6] Plaintiff can not account for the disparity in these two numbers.

ing the acknowledgment by the Supreme Court that assessments are essential before income taxes can be owed, are as follows:

> The agents informed him of the jeopardy ***assessments*** and demanded payment. (Page 343)

> The Court of Appeals for the most part reversed. It ruled that . . .petitioner had not sustained its burden of proving the ***assessments*** to be erroneous; and that the trial court erred in invalidating the **assessments** and in dismissing the Government's counterclaim...(p 348)

> ...we declined to review petitioner's and Norman's son's claims that the **assessments** and levies should have been voided...We approach this case accepting the Court of Appeals' determination that the **assessments** and levies were valid . . .Those facts necessarily establish probable cause to believe that assets held by petitioner were properly subject to seizure in satisfaction of the **assessments.** (p.351)

Here, of course, the Supreme course acknowledges that 1) the IRS could only "demand payment" after the jeopardy **assessment** had been made; 2) the *invalidation* of the assessment *invalidated* the Government's claim; 3) that the taxpayer's property was seized to *satisfy* the **assessments**; obviously, without the assessments, there would be nothing to "*satisfy.*" However based on the Panel's instant ruling no jeopardy assessments in the above case were apparently needed. The IRS could simply have seized the money in payment of income taxes on the basis

of the 9th Circuit instant decision, that "there is no requirement that the IRS make a formal assessment (jeopardy or otherwise) of the tax liability before payment is necessary."

Verification that assessments are a condition precedent to the "owing" of income taxes can be found in the definitive work "IRS Practice and Procedure," Second Edition by M. Saltzman. Here is what Mr. Saltzman has to say about the significance of assessments.

> 1) The assessment of a tax creates a debt...Once the assessment is made.... the government, without judicial intervention, may summarily collect the assessment. (Paragraph 14.01[2])

Obviously therefore, only following an assessment **is a tax debt created**, and without an assessment, the government can not collect the tax without judicial intervention.

> 2) An assessment is the official act of recording the liability of a taxpayer....and requires the signing of the assessment certificate by the assessment officer...(and) is the first step in the collection process. (Paragraph 14.05[1])

Therefore, according to Saltzman, the making of an assessment "is the first step in the collection process" without which, *the collection process can't even begin.*

> 3) A taxpayer's liability is recorded by the official act of assessment. (Par.14.05 [2]

Since the Government acknowledges that no 1996 income taxes have ever been assessed against plaintiffs, than, according to Saltzman, no tax liability for 1996 taxes can exist and no "collection process" can even begin. What can be plainer than that?

Therefore the Court's ruling that "there is no requirement that the IRS make a formal assessment (are there "informal" assessments?) before payment is necessary" is contrary to at least 40 statutes requiring assessments, such Supreme Court's holdings as ***Bull, Rosenman, G. M Leasing*** (and others too numerous to mention) and the definitive observations of M. Saltzman

THE PANEL'S CLAIM THAT THE "SIXTEENTH AMENDMENT AUTHORIZES A DIRECT NON-APPORTIONED INCOME TAX ON RESIDENT UNITED STATES CITIZENS" IS A TOTALLY FALSE CLAIM

In plaintiff's Reply Brief he extensively briefed the panel that the Supreme Court in the *Brushaber* decision held that the effect of the 16th Amendment was to allow the government to impose an income tax in the form of an excise tax, and not in the form of a non-apportioned direct tax on income. Plaintiff even quoted for the appeals panel the very words of the Supreme Court in *Brushaber*, where the Court stated (on pages 16 & 17) that:

> Taxation on income was in its nature an ***excise*** entitled to be ***enforced as such.*** (Emphasis added)

Plaintiff also included as Exhibit E pages 4 & 5

of the "CRS Report for Congress" which reported that the Supreme Court had held that the 16th Amendment did not "authorize any new type of tax" and that "Direct taxes were notwithstanding the advent of the Sixteenth Amendment still subject to the rule of apportionment and indirect taxes were still subject to the rule of uniformity." And plaintiff even pointed out to this Court that in its report the Congressional Research Service even captioned one paragraph in that report as follows, "WHAT DOES THE (SUPREME) COURT MEAN WHEN IT STATES THAT THE INCOME TAX IS IN THE NATURE OF AN EXCISE TAX?"

Therefore for the Ninth Circle panel to hold that the "Sixteenth Amendment authorized a direct no-apportioned income tax on resident United States citizens" when Plaintiff supplied the Court with irrefutable evidence that the Supreme Court in *Brushaber* (and other cases quoted by plaintiff) held that the 16th Amendment did not amend the Constitution but allowed an income tax to be imposed in the form of an ***excise tax*** "on income separated from its source," means that Judges James Browning, Clifford Wallace and Edward Leavy have deliberately falsified their ruling and are guilty of obstruction of justice and blatant violations of their oaths of office.

If the Panel believed that its decision were valid, why don't they publish it? And plaintiff moves this Court that it do so? The novel insight of the 9th Circuit that income tax assessments are not legally necessary should be shared with other federal courts around the country, since they are obviously laboring under a contrary belief.

It is clear that plaintiffs-appellants are entitled to a refund on two grounds.

1) If the funds at issue involved income taxes (which they do not) they would be entitled to a refund on the basis that no income tax assessments exist against them for the year at issue, and no court has ever held that they owe more in income taxes than what they reported on their 1996 income tax return as provided in Code Section 6501(c)(1).

2) Since the funds at issue involve the unapportioned, wage tax imposed in Code Section 3402, they are entitled to have these taxes refunded to them pursuant to the provisions of Code Section 31(a)(1) and the United States Constitution which bars the Government from imposing and collecting an unapportioned, direct tax on wages

The reputation of the 9th Circuit will not be salvaged by the fact that the Panel's egregious ruling is to be unpublished. This egregious ruling – if it is not reversed - will be publicized far and wide and will serve as an example to the American public concerning the reliability and integrity of federal court decisions.

Based upon all of the above, the Court's ruling of October 26 must be reconsidered and reversed either by the panel itself or on the basis of an en banc consideration.

Respectfully submitted,

Robert and Elena Brown

APPENDIX F –
PLAINTIFF/APPELLANTS' OPENING BRIEF ON APPEAL TO THE NINTH CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CASE NO 99-15308
Lower Court Docket No. CV-98-00825-PMP

ROBERT A. AND ELENA H. BROWN
Appellant/Petitioners

vs.

UNITED STATES OF AMERICA
Defendants - Appellees

APPELLANTS' OR PETITIONERS'
INFORMAL BRIEF

1. Jurisdiction

a. Timeliness of Appeal or Petition:

(i) Date of entry of judgment or order of district court: **January 21, 1999**

(ii) Date of service of any motion made after judgment (other than for fees and costs):

_____

(iii) Date of entry or order deciding motion_____

(iv) Date of notice of appeal or petition

filed **On or about January 30, 1999**

(v) For prisoners, date you gave notice of appeal to prison authorities

_____

b. PLEASE ATTACH ONE COPY OF EACH OF THE FOLLOWING

1. The order from which you are appealing
2. The district court's entry of judgment
3. The district court's docket sheet

CASE NO 99-15308

What are the facts of your case.

On or about April 14, 1997 Plaintiffs filed a 1996 income tax return showing no income taxes due and owing for that year and, therefore, requested a refund of the $5,035 in wage taxes (imposed pursuant to Code Section 3402(a)(1)) that they had paid for that year. When Plaintiffs filed their 1996 income tax return (claiming a tax refund) and when filing this instant lawsuit, they erroneously assumed the funds being held by Defendant were income taxes. However, since filing their claim for refund and this refund law suit, Plaintiffs have discovered that the funds at issue were actually exacted as "***wage taxes***" imposed in Code Section 3402(a)(1). Plaintiffs had been mislead by Defendant (using a variety of techniques) into believing that the $5,035 at issue represented income taxes – imposed in Section 1 of the

Code – when such was not the case. Since Plaintiffs believed that income taxes are based on "self-assessment, " Plaintiff sued for recovery of the funds at issue on the grounds that the "income" taxes they thought they had paid had never been assessed as specifically required by Code Section 6201, numerous other statutes, and IRS procedure manuals – see Exhibits A & B.

Exhibit A are pages 3.17.63-122 & 123 of the IRS' "SC and MCC Accounting and Data Control" manual (MT 3.17-291, 10/01/97). Relevant excerpts from this manual are as follows:

> The Summary Record of Assessments provides the detail assessment data by type of tax and if the assessment was current or deficiency. Assessments are broken type into four types: Regular (R), Jeopardy (J), Quick (Q), and Prompt...."
>
> Continuing from MT 3.17-291....
>
> The Summary Record of Assessments *must be signed* by the Assessment Officer on the date the assessment is made as outlined in IRM Manual 3(17)(63)5.3. The *certification* statement included in the report. At least one person in each center must be assigned the *responsibility* of reviewing all certificates for *timely* entry of the assessment officer's signature and date. The *responsible* employee will initial the certificate after *validation*. This practice should be accomplished daily in case statutes are involved. (Emphasis added throughout)

Note the elaborate descriptions for making assessments which are further shown on page 2 of Exhibit B. If assessments count for nothing as Judge Pro seems to think, why all the fuss and elaboration (as shown above) for making them? Why all this bother?

Plaintiffs have also attached as Exhibit B page 3(17)(63)0-96(10-1-89) from IRS Manual MT 3(17)00-193, and page 3 from IRS Manual MT3(17)00-184) Note paragraph 3(17)(63)(14).1 which states:

> The assessment Certificate must be signed by the Assessment Officer and dated. **The Assessment Certificate is the *legal document* that permits collection activity**. (Emphasis added)

Obviously if an Assessment Certificate is the ***LEGAL* DOCUMENT** "that *permits* collection activity" any attempt by the United States to keep (i.e. "collect") the funds at issue WITHOUT such a "legal document" *obviously,* has to be ***illegal.*** No other legal conclusion is possible

Plaintiffs request that this Court to take judicial notice of all the elaborate directions for making assessments as described in Exhibit B2 - yet Judge Pro has ruled that "the absence of a tax assessment does not prove that a taxpayer owes no taxes." If this is true, than what does an assessment prove? Nothing?

The fact that an assessment (or a court determination) must be in effect before any income taxes can be said to be owed is also confirmed (if common sense is not enough) in Sen. William v. Roth's, Jr.

new book, **THE POWER TO DESTROY** which reports on, and exposes the wide spread, illegal practices employed by the IRS.[7] Attached as Exhibit C is page 71 of that book in which the Senator recounts how such illegal IRS activities were directed at Tom Savage of Lewes, Delaware.

> Savage and his tax counselor filed an immediate protest with the local appeals office, but before they received the opportunity to be heard - and *before an* ***assessment****, or* ***judgment****, had been entered* against either the phony partnership or Savage's company - the collection officer seized a large check that had been written to TSA, a check the small businessman depended on to pay his own bills. This a *clear violation of the tax code*, which makes it ***unlawful*** (i.e. **criminal**) for the Internal Revenue Service to seize taxpayer property or undertake ***any*** *type of enforcement action* until an assessment has been appropriately entered against a taxpayer. (Emphasis added throughout)

Note that in the above paragraph Sen. Roth points out that it is "a clear violation of the take code" and "unlawful" (i.e. criminal) "to seize taxpayer property or undertake any type of enforcement action until an assessment has been appropriately entered against a taxpayer." Yet this is precisely the situation we have here! In the above example the unlawful behavior

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[7] Senator Roth is chairman of the Senate Finance Committee, the Senate oversight Committee for the IRS. He attempts to blame the IRS for the numerous "abuses" (actually violations of law) uncovered by his Committee - when the actual blame lies with Congress and the Courts, which allow the IRS to get away with it.

was committed by an IRS agent. In the instant case (involving the same set of facts - the Defendant holds $5,035.57 of Plaintiffs' money, even though no assessment nor judgment exists with respect to any such amount or tax due) the "unlawful" action was committed by Judge Philip M. Pro - by ruling that even in such circumstances the United States is still legally entitled to keep the money at issue. The only question now is - will the Ninth Circuit become his accomplice and accessories after the fact, by affirming his "unlawful" ruling?

It is important for this Court to understand that as of the date that Plaintiffs filed their claim for refund

1. No assessment for 1996 income taxes existed, and

2. No court of competent jurisdiction had ***ever*** determined that plaintiffs owed *more* in income taxes than what they reported on their 1996 income tax return.

Therefore, it cannot be contended by any court - on ***any*** basis- that as of the date Plaintiffs filed their claim for refund, they owed more in income taxes then what they reported on their 1996 income tax return. It is clear that under the ***laws passed by Congress*** (as will be shown below) only 3 persons can be said to be legally authorized to determine if income taxes are owed:

1. Taxpayers who "self-assesses" themselves on 1040s.

2. Tax Court judges who determine – pursu-

ant to Code Section 6214 - that there is a "deficiency" in the self-assessment made by taxpayers.

3. District Court Judges whose jurisdiction is invoked by the United States pursuant to Code Sections 6501(c)(1) and 6501(e)(1)(A), because United States contends that the returns filed by such taxpayer are "false or fraudulent" [8] and, therefore, initiates "***a proceeding in court for collection of such tax***".

Code Section 6501(e)(1)(A) clearly provides, in relevant part, that with respect to income taxes "the tax may be ***assessed***, or a proceeding in court for the collection of such tax may begun without assessment...." (emphasis added). Thus the provisions of 6501 make it *crystal clear* that *before* any court could claim that Plaintiffs ***LEGALLY*** owed income taxes for the year at issue, such taxes would have had to be either:

1. Assessed, or
2. Determined to be owed as a consequence of a civil lawsuit brought by the United States pursuant to the provisions of 6501.

Since neither of the above two actions ever took place in connection with income taxes Plaintiffs allegedly owe for 1996, no ***court*** can ***LEGALLY*** con-

[8] Since as of the dates that Defendants filed their claim for refund and refund law suit, the Government had never charged Plaintiff's with filing a "false or fraudulent return" with respect to their 1996 return, both the Defendant and any Court is estopped from making any such claim with respect to their 1996 income tax return.

tend that plaintiffs owe more in income taxes than what they reported on their 1996 income tax return.

Therefore, despite having no lawful basis (as explained above) for contending that Plaintiffs owed more in income taxes than what they reported on their 1996 income tax return, Defendant – in violation of law – refused to refund to Plaintiffs the $5,035 at issue – necessitating this lawsuit.

The claim by the Trial Court (in awarding a summary judgment to the United States) that "The absence of a tax assessment by the Internal Revenue Service does not prove that a taxpayer owes no taxes" is, therefore, absurd on its face. Apart from flying in the face of numerous Title 26 statutes - such as Section 6501 and official IRS procedures, as shown above, such a claim also flies in he face of common sense! Since if "The absence of a tax assessment does not prove that a taxpayer owes no income taxes," then what, if anything, do assessments "prove"? If assessments "prove" nothing – than why do approximately 40 statutes and IRS procedures require them? If the absence of an assessment does not establish – i.e. "prove" - that taxes are *not* owed, then ***what*** does "prove" that taxes *are* legally owed? Obviously, therefore, the claim by Judge Philip M. Pro, that "The absence of a tax assessment by the Internal Revenue Service does not prove that a taxpayer owes no taxes" stands both law and logic on their respective heads.

Judge Pro basis his irrational claim on two, irrelevant sources: Code Section 6151, and *Moran v. U.S.*, 63 F.3rd 663. Section 6151, as the following will show, is a ***totally benign statute*** having nothing to do with either income taxes or the wage taxes at issue, while the facts and issues in *Moran* are not only

totally unrelated to the facts and issues involved in this case, but *Moran,* itself, *proves* that income taxes are being unconstitutionally exacted. Since all *mandatory*, federal taxes must be collected either on the basis of *apportionment* or on the basis of geographic *uniformity, Moran* demonstrates that income taxes are being collected differently in the Fifth and Eight Circuits from how they are being collected in the Second, Third, Fourth, Sixth and Federal Circuits. [9] Therefore income taxes are - ***admittedly*** – being exacted neither on the basis of *apportionment,* as required in Article 1, Sections 2 and 9, Clauses 3 and 4, nor on the basis of *geographic uniformityi,* as required by Article 1, Section 8, Clause 1 – and, as such, ***their exaction can not be made mandatory.***

Thus it is undeniable, that based upon *Moran* - income taxes are admittedly *not* being enforced on the basis of geographic uniformly. Therefore, since neither income taxes (nor the "wage" tax at issue) are not being enforced *either* pursuant to Rule of Geographic Uniformity nor the Rule of Apportionment, the taxes at issue are not being *enforced* pursuant to either class of taxes authorized in the Constitution: therefore, the United States can not retain the funds at issue, since Plaintiffs can not be compelled to pay a federal tax which is not *enforced* pursuant to one constitutional rule or the other - as held by the Supreme Court in the bed rock case of *Brushaber v. Union Pacific RR,* 240 US 1 at page 12. The 16th Amendment gave the government no new taxing power nor did it modify *in any way* the apportionment provisions of the Constitution with respect to direct taxes,

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[9] Apart from everything else, any law that can generate such a divergence of legal opinion (as is described in *Moran)* must mean that the statute involved is "void for vagueness." How can any other conclusion be rationally possible?

and the holding in *Pollock* (158 U.S.601), that unapportioned, direct taxes unconstitutional. See also *Stanton v. Baltic Mining Co.*, 240 US 103 at page 112: "...the provisions of the Sixteenth Amendment conferred ***no new power of taxation***....", but that "The whole purpose of the Amendment was to relieve all income taxes when imposed from apportionment from *a consideration of the source* whence the income was derived." (*Brushaber*, supra, at page 17, emphasis added in both quotes)

In addition to all of the above, the wage taxes at issue - as imposed in Code Section 3402(a)(1) - has nothing to do with either the 16th Amendment or income taxes. The tax imposed in Code Section 3402(a)(1) – being a direct tax on wages - would obviously be unconstitutional if it were not made refundable *upon request* (as provided for in Code Section 31(a)(1)), since it not being imposed either as an "income" tax nor on the basis of apportionment, and, as such, it can not claim the protection of either the 16th. Amendment nor the *Brushaber* decision. See Brushaber, supra at page 12; and *Pollock v. Farmers Loan & Trust*, 158 U.S. 601) both of which held that a direct tax on "sources" of income (as opposed to a direct tax on "income" *separated* from those "sources") is unconstitutional if not apportioned. [10] That the "wage tax" provided for in Code Section 3402(a)(1)is indeed a separate and distinct tax from the income tax imposed in Section 1, is confirmed by Code Sec-

[10] The caption over Code Section 3402 "Income tax collected at source" was obviously designed by the Government to mislead the American public into thinking that what was being withheld from their wages were income taxes, when in realty what was being taken from their pay was an unapportioned, wage tax, which they could take as a "credit" against any income taxes ultimately due – thus creating the *appearance* that income taxes were being "withheld" – when such is not the case.

tion 6413 which states, in relevant, part that "If more than the correct amount of tax imposed by Section 3101, 3111, 3221, ***or 3402*** is paid etc. etc. etc. etc." (emphasis added) . Therefore a *separate* and *distinct* "wage tax" is obviously being "imposed" in Code Section 3402 – having *nothing* to do with *either* the "income tax" imposed in Section 1 of the Code, or the 16th Amendment.

CODE SECTION 31(a)

Code Section 31(a) provides that "The amount withheld as tax under chapter 24 [which includes Code Section 31] shall be allowed to the recipient of the income as a credit against the tax imposed by this subtitle." Therefore, based upon this statute, the $5,035.57 in wage taxes "withhold as tax" from Plaintiffs pursuant to Code Section 3402(a)(1) must be "credited" (i.e. refunded) to them "against the tax imposed" in subtitle a. Such a refund *must* be allowed as a matter of constitutional law - irrespective of any other consideration – for all of the reasons stated above. Since Plaintiffs' 1996 income tax return showed they owed no 1996 income taxes as imposed in subtitle a., and since the United States has not produced any contrary document – i.e. an assessment certificate or a decision of a Tax Court or District Court – that establishes that Plaintiffs *legally* owed more income taxes than what they claimed on their 1996 tax return, the amount at issue *must* be refunded to them pursuant to Code Section 31(a)(1) *as a matter of law.*

Plaintiffs admit that this particular issue – i.e. the wage taxes at issue which were exacted pursuant to Code Section 3402(a)(1) - was not raised in their initial claim or even in their underlying complaint,

since the fraud perpetrated by the Government (in mislabeling Code Section 3402)) was not discovered by these *pro se* Plaintiffs until after their claim for refund and complaint were filed. However, this deception should have been recognized and understood by the Trial Court, and overlooking it amounts to *plain error* on the part of the Trial Court. In any case, the United States can not contend in its Reply Brief – and is estopped from doing so - that Plaintiffs can not raise this issue on appeal because it was not raised before, *because it would be contrary to the principles of equity to allow the United States to profit from its own deception* and this court has equity jurisdiction. The United States *deliberately* sought to *deceive* Plaintiffs (as has already been explained) into thinking that what was being withheld from their pay was income taxes, when this was *not the case*.

THIS COURT HAS TAKEN AN OATH TO UPHOLD THE CONSTITUTION OF THE UNITED STATES

The United States Constitution provides in Article 1, Sections 2 and 9, clauses 3 and 4 that "all direct taxes shall be apportioned among the several states" pursuant to "a census or enumeration . . . directed to be taken." The only thing that the Constitution says twice is that direct taxes *must be apportioned.* The United States is now holding $5,035.57 of Plaintiffs' money, which it acquired by imposing a *direct tax - not apportioned* - on Plaintiffs' wages. What saves this tax - imposed in Code Section 3402 - from being blatantly unconstitutional is Plaintiffs' legal right to get the withheld tax refunded to them upon request, based on the provisions of 31(a)(1), as is being done here. Should this Court *DISREGARD* ITS *OATH TO UPHOLD THE CONSTITUTION* and rule that

Plaintiffs can not get this unapportioned, direct tax refunded to them, then Plaintiffs are claiming that the *WAGE TAX* imposed in Code Section 3402 is unconstitutional and will appeal to the Supreme Court on that basis.

WITH RESPECT TO THE AUTHORITIES UPON WHICH JUDGE PRO'S RULING WAS BASED

Judge Pro basis his claim that "The absence of a tax assessment by the Internal Revenue Service does not prove that a taxpayer owes no taxes on two authorities: 26 U.S.C 6151 and *Moran v. U.S., supra.*

Apart from the fact that *Moran* establishes that the taxes at issue are being collected unconstitutionally for the reasons already discussed, the facts and elements in *Moran* have absolutely nothing to do with the facts and elements in the instant case. The taxpayers in *Moran* (unlike the Plaintiffs here) determined that some income taxes were due. Subsequently the IRS issued a deficiency notice (also absent in the instant case) and "The taxpayers responded by filing a petition with the tax court contesting the deficiency determination." Then "On December 13, 1985 and July 14, 1986, the Morans remitted to the IRS $331,000 and $255,383" with a letter stating that these amounts should be treated as a partial payment for the taxes and interest due and even indicated how the amounts should be allocated. The 7th Circuit specifically concluded, therefore, that these remittances were "not a deposit in the nature of a cash bond." Approximately four years later the case was settled with the parties agreeing that the Morans had overpaid their taxes by approximately $214,000.

Therefore the Morans filed a refund for the difference on November 12, 1991 "for the amounts sent to the IRS in 1985 and 1986 that had been assessed on September 9 (1991)" The government denied their claim by claiming that "the Morans' earlier remittances were in fact tax payments, as indicated in their letters" and in any case "they could not collect because they had not requested their refund in a timely fashion." In any case the trial court sided with the Morans, which was reversed on appeal.[11]

Thus none of the elements in *Moran* are present in the instant case. The Plaintiffs never claimed in any letter to the IRS that they owed any taxes for the year at issue. Indeed the Plaintiffs in their 1996 income taxes claimed that they owed no income taxes for that year. No deficiency notice was ever sent. No tax court was involved and plaintiffs filed a timely claim for refund Therefore, the trial courts attempt to apply *Moran* to the instant case is so outrageous as to amount to *a clear cut case of judicial fraud and an attempt to obstruct justice.*

In relying on *Moran,* which was not binding on him, Judge Pro ignores (as cited in Plaintiffs' underlying pleadings) a Supreme Court case that is binding on him, namely *Bull v. U.S.*, 295 U.S. 247 wherein the Supreme Court held on page 249:

> Once the tax is assessed, the taxpayer will owe the sovereign the amount when the date fixed for payment arrives.

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[11] Without analysing this case further it is clear that the trial court's decision was statutorally correct, while the 7th Circuit' s totured reversal (using cabalistic logic, reminessant of medival arguments concerning how many angels can dance on the head of a pin) simple proves that it is impossible for lay persons to actuallv know what the law is.

Therefore Judge Pro's claim that "The absence of a tax assessment . . . does not prove that a taxpayer owes no taxes" flies in the face of *Bull*..

While ignoring *Bull* and basing his decision on a totally unrelated case, Judge Pro also ignored such on point cases as *Behren v. United* 764 F. Supp 180, *Radinsky v. U.S.,* 622 F. Supp. 412(1985) and a Nevada District Court case, *In Re Western Trading Company,* 340 F. Supp 1130 (1972)

In *Behren* v. *United States* 764 F. Supp 180, a United States District Court in the Southern District of Florida, held as follows:

> Under *Chila,* (*United States v. Chila,* 871 F.2d 1015 (11th Cir. 1989)) it is clear that without proper assessment and notice, *the government must file a civil suit* to obtain a judgment. The Court declines at this time to determine whether there was a proper assessment and notice provided.(emphasis added)

Further the *Behren* court went on to say: (on page 182)

> The threshold issue for determination by this Court then is whether assessment, notice and demand of the allegedly outstanding 1974 taxes were a timely made. Resolution of this question will provide the parties guidance as to the proper forum for this dispute. The issue is hotly contested by the parties. The Court must therefore deny defendant's motion.

And on page 183 the *Behren's court noted:*

> In order to collect a tax by administrative means under Sec. 6502, the IRS is required to assess a tax on its records and **provide a notice of that assessment.** Defendant (the Government) has submitted substantial documentation that it properly assessed the 1974 tax. Defendant asserts that the certificate of assessments and payments contained in the record before this Court establishes the presumptive correctness and making of the assessment.

In the instant case, however, not only aren't these issues "hotly contested" but the Government ***admits that no assessment or demand for payment WAS EVER SENT OUT***. So if the ***Behren*** court rejected the Government's request for a summary judgment because these issues were "hotly contested" how could the trial court in this instance award the United States a summary judgment when these issues are ***not even contested***, since the Government readily admits that no assessment exists and no demand for payment was ever made. Obviously, if the ***Behren*** Court is telling the truth, than the trial court in this instance is not. Two other cases that establish that the trial court is not telling the truth are, *In* ***Re Western Trading Company*** 340 F.Supp. 1130(1972) and ***Radinsky v. U.S.***, 622 F. Supp.412(1985). In ***Western Trading***, a Nevada District Court case, the court stated as follows:

> While the bankruptcy court may be required to reconsider its order of confirmation ...it need do so only if the delayed claim is for a tax "found to be owing" within one year of the filing of the petition. "Found to be owing" as used in this section means "assessed." The In-

> ternal Revenue Code provides for a specific procedure for assessments (26 U.S.C. 6203). An assessment is an administrative determination of tax liability. Kurio v. United States 281 F. Supp. 252 (S.D.Tex.1968); United States v. Miller, 318 F.2d 637 (7th Cir. 1963). ***And until the assessment has been made, the tax has not been found to be owing.*** (emphasis added)

In the instant decision, Judge Pro held totally contrary to the holding of this Nevada District Court - that even when no assessment exist, an income tax can "be owing"? If so, than which Nevada District Court should the public believe - Judge Pro or the Nevada court in ***Western Trading***?

In ***Radinsky v. U.S.***, 622 F. Supp.412(1985). the government was trying to hold on to money paid for taxes which had never been assessed, and look what the court said about that:

> In the two briefs filed in this action, the IRS has not explained where it finds ***statutory authority*** to employ its tax collection procedures ***to collect from the plaintiffs a sum of money that has never been assessed as a tax***. Since the IRS had no authority to adjust the plaintiff's account or employ deficiency procedures in these circumstances, it is self-evident that the collection of the sum in this manner was wrongful

In addition, the court rejected the government's incredulous argument that

> The plaintiff's are not "taxpayers" because no tax has been assessed. "The United States

agrees that *taxpayers* do have recourse against the United States under 28 U.S.C. 1346(a)(1). But in this case, the plaintiffs are not taxpayers." (Defendant's motion for summary judgment at 2)

In ***Radinsky***, the Justice Department argued assessments were so important, that since none had been made against the Radinskys (even though "the IRS succeeded in collecting, the disputed money as a 'tax'") they were not "taxpayers" and so could not sue to recover the amount the IRS had "succeeded in collecting" because, the government argued, "Section 1346(a)(1) requires full payment of an assessment before an income tax refund suit can be maintained." The court in this case rejected this "heads I win, tails you lose" argument. In the instant case, the Court claims that assessments are so *unimportant*, that taxes can be legally owed with them.

Since in ***Radinsky***, the court held that since the amount at issue "had never been assessed as a tax" the money was "wrongfully," held, how could this trial court rule otherwise? If the money was "wrongfully" held in *Radinsky*, it is being "wrongfully" held here - and one doesn't need a law degree to figure that out. And for the 9th Circuit to rule otherwise, would be - apart from everything else - to deny Plaintiffs their constitutional right of equal protection under the law.

In addition the Radinsky court pointed out that the "IRS has not explained where it finds ***statutory authority*** . . . ***to collect from the plaintiffs a sum of money that has never been assessed as a tax***. Plaintiff would ask the same question of this Appeals Court. If Radinsky could ask that question of the

IRS, why can't Plaintiffs - with equal justification- ask it of this Court? **WHERE DOES THIS COURT FIND STATUTORY AUTHORITY TO ALLOW THE GOVERNMENT TO COLLECT FROM PLAINTIFFS A SUM OF MONEY THAT HAS NEVER BEEN ASSESSED AS A TAX?**

WITH RESPECT TO CODE SECTION 6151

Apart from *Moran* supra, the only other authority that Judge Pro cites to support his novel theory that assessments don't count is Code Section 6151. Judge Pro basis his claim on paragraph 6151(a), which states as follows:

> Except as otherwise provided in this subchapter, when a return of tax is required under this title or regulations, the person required to make such return shall, **without assessment or notice and demand from the Secretary**, pay such tax to the internal revenue officer with whom the return is filed, and shall pay such tax at the time and place fixed for filing return (determined without regard to any extension of time for filing the return).

However, as the following will show:

1) Section 6151 is a totally benign statute, having no force and effect of law whatsoever ***as related to income taxes.***

2) If anything, it can only apply to certain excise taxes appearing in CFR 27.

3) And, in any case, plaintiff compiled

fully with the provisions of Code Section 6151 even though the statute does not apply to him or income taxes.

Attached, as Exhibit E is the "Privacy Act Notice" that appears in the income tax, 1040 booklet. The only Code Sections that the Government claims are related to the payment of income taxes – and the only statutes the public is directed to obey – are Code Sections 6001, 6011, and 6012, and we will get to them forthwith. Obviously, if Code Section 6151 had anything to do with income taxes, it would have been included in the Privacy Act Notice along with these statutes. This factor ***alone*** proves that the Government's reliance on Code Section 6151 is misplaced, contrived, and totally without merit.

In addition, both Code Sections 6001 and 6001 notify the public that they need only "comply with (such) regulations as the Secretary may from time to time prescribe," or do something "when required by regulations..." Nothing in this statute notifies the public that they are required to comply with the statutes themselves – such as 6151 – or that they have to comply (or pay attention to) court decisions involving litigation in which they took no part, such as ***Moran***, supra. So, again, the Plaintiff's are not bound by ***Moran*** but only a legislative, Treasury regulation "***having the force and effect of law.***"

The fact that Section 6151 has nothing to do with income taxes is further established in Exhibit F. This is an excerpt from the Parallel Table of Authorities which shows that the implementing regulations for Code Section 6151 as in CFR 27, the Code of Federal Regulations dealing with "Alcohol, Tobacco Prod-

ucts and Firearms", in parts "17, 22, 25, 53, 194, 270 and 290." There is no entry here that shows that any implementing regulation for this statute exists in CFR 26, the Code of Federal Regulations dealing with income taxes. This is further proof that Code Section 6151 has absolutely nothing to do with income taxes but is only related to the payment of alcohol, tobacco and firearms taxes.

However, even if we go to CFR 26 we will find a totally benign regulation in connection with this statute that appears there: it is Reg. No. 301.6151-1. It is a totally benign regulation because no ***legislative*** or other ***authority*** is shown ***as being the authority for this regulation.*** The regulation itself says nothing anyway. Since it says (and I quote the entire regulation) as follows:

> For provisions concerning the time and place for paying tax shown on returns with respect to a particular tax, see the regulation relating to such tax.

THAT'S IT! All this regulation does, is to tell you to search out the regulation for a "particular tax" and "see" what ***that*** regulation tells you! But this regulation itself tells you nothing. It says ***absolutely nothing*** about income taxes, let alone contain a requirement that income taxes are required to be paid on ***any*** basis. So, obviously, this statute and its bogus regulation (since no legislative support for the regulation is shown) are totally benign, at least as far as income taxes are concerned.

But in any case, Plaintiff ***even complied*** with this *irrelevant* statute and its *bogus* regulation – since both the statute and the regulation deal with the pay-

ment of taxes, (as specifically worded in the regulation, and implied in the statute) "shown on a return" Plaintiffs did just that: they "paid" the exact amount of taxes "shown" on their return which was "due and owing." The "amount" shown as taxes "due" on their return was "zero" and that is ***exactly what Plaintiff paid with their return – "zero."*** Therefore, Plaintiff complied with this statute and "paid" "without assessment or notice and demand from the Secretary" the amount of taxes "shown" on their return – just like the statute requested. However, since Plaintiffs had already erroneously overpaid the amount "shown" on their return by some $5,158.39, they requested a refund for that amount. Therefore, Plaintiff complied with all of the benign provisions of Code Section 6151 and its bogus regulation. Therefore, for Judge Pro to suggest that Plaintiffs violated any of the provisions of this benign statute (while he blithely proceeds to violate some fifty others dealing with the need for making income tax assessments) is incredulous to say the least.

In addition to everything else, Code Section 6151 cannot apply to the provisions of Code Section 31(a)(1). And based upon this statute, Plaintiffs are entitled to a refund for all of the reasons already stated.

Apart from the issue of the "wage" tax as discussed above, Plaintiffs believe (as the following will show) that they were entitled to a summary judgment based upon the laws, regulations, and related authorities they already raised in their underlying pleadings, but which Judge Philip M. Pro ignored, so he could contrive a ruling favorable to the United States regardless of how lawless and nonsensical that ruling had to be. So while Plaintiffs do not feel it necessary

to rehash and restate all of the arguments contained in their 26 pages of underlying pleadings, in the interest of completeness, Plaintiffs has excerpted one of the arguments contained in their "MOTION FOR SUMMARY JUDGMENT" in which they referred (at page 7) to the authoritative observations from M. Saltzman's, "IRS Practice and Procedure." This work is often quoted as an authority in court decisions bearing on income taxes – but which Judge Pro chose to ignore when handing down his decision from which this appeal is taken.

Verification that assessments are a condition precedent to the "owing" of income taxes can be found in M. Saltzman's definitive work "IRS Practice and Procedure," Second Edition. Here is what Mr. Saltzman has to say about the significance of assessments, which, according to Judge Pro, have no significance.

> 1) The assessment of a tax creates a debt....Once the assessment is made...the government, without judicial intervention, may summarily collect the assessment. (Paragraph 14.01[2])

Obviously therefore, only following an assessment **is a tax debt created**, and without an assessment, the government cannot collect the tax without judicial intervention.

> 2) The assessment is the official act of recording the liability of a taxpayer...and requires the signing of the assessment certificate by the assessment officer...(and) is the first step in the collection process. (Paragraph 14.05[1])

Therefore, according to Saltzman, the making of an assessment certificate "is the first step in the collection process" without which *the collection process cannot even begin.*

3) A taxpayer's liability is recorded by the official act of assessment. (Paragraph 14.05[2])

Since the Government acknowledges that no 1996 income taxes have ever been assessed against Plaintiffs, than, according to Saltzman, no tax liability for 1996 taxes can exist and no "collection process" can even begin. What can be plainer than that?

Therefore, based upon Code Sections 31(a)(1), 6201, 6203, 6303, 6501, 6502, 6852, and 6861, Treasury Regulation 601.103, the IRS' own internal procedures and documents, such Supreme Court decisions as ***Bull,*** supra, and Professor Saltzman's commentaries, it is clear that without an assessment for 1996 income taxes having been made against Plaintiffs, Plaintiffs could not have owed any 1996 income taxes as of the date that the United States received Plaintiffs claim for refund. As of that date, no collection process could have begun; therefore, defendant had no lawful basis to deny refunding to plaintiff the $5,035.57 refund requested.

Based on all of the above Plaintiffs requests that this Honorable Court reverse the decision of Philip M. Pro of January 21, 1999 in which he awarded a summary judgment to the United States.

Respectfully submitted,

Robert and Elena Brown

APPENDIX G –
PLANITIFF/APPELLANTS'
REPLY BRIEF TO THE NINTH CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT A. AND ELENA H. BROWN; et al.,
CASE NO 99-15308

Plaintiffs-Appellants,

No. CV-98-00825-PMP

v.

Lower Court Docket UNITED STATES OF AMERICA,

Defendants - Appellees

APPELANTS/ PETITIONERS' INFORMAL REPLY BRIEF

If the Ninth Circuit were ever to adopt the Government's position that:

1. Income taxes can be legally owed absent assessments,
2. Code section 6151 (all by itself) establishes that income taxes are required to be paid even though this statute has no *legislative*, implementing regulation, and ***no mention*** of this statute appears in the "Privacy Act

Notice" of a 1040 booklet, and that

3. Code section 3402 "does not impose a tax" (Defendant's Reply, page 12, line 15), when Code Section 6413(a)(1) clearly states that it does;

Then, this Court will have abandoned any claim to being a legitimate court. And the Court will not be able to save its reputation by not "publishing" such a ruling, "[12] since such an egregious ruling *will be* "published" and *publicized* on the Internet as well as in various other places.

The Government's Reply Brief also demonstrates that the oaths of office taken by Loretta C. Argrett, the Assistant Attorney General, Gilbert S. Rothenberg and Alice L. Ronk, Justice Department attorneys, (those listed on the Government's Reply Brief) to "see justice done" is a meaningless oath. Instead of attempting to "see justice done" this trio have actually conspired to obstruct justice, by fraudulently claiming that Plaintiffs- Appellants are not entitled to the refund requested - when, obviously, they are. In addition, this trio would also appear to be in criminal violation of 18 U.S.C 241 which makes it a crime for "two or more persons (to) conspire to injure and oppress...any citizen in the...enjoyment of any right or privilege secured to him by the Constitution or laws of the United States." Pursuant to the Constitution and laws of the United States the Plaintiffs-Appellants are clearly entitled to have refunded to them the $5,035.57 at issue, which no amount of

[12] It goes without saying that the Court would never "publish" such a ruling, since it, obviously, would make this Court a laughing stock amongst any group of people who had the slightest understanding of our laws, especially the Internal Revenue Code.

legal double talk can obscure.

I

WITH RESPECT TO THE GOVERNMENT'S CLAIM THAT THE FUNDS AT ISSUE (THE WAGE TAX IMPOSED IN CODE SECTION 6501) AND INCOME TAXES GENERALLY CAN BE OWED ABSENT ASSESSMENTS

Despite all of the statutes and supporting authorities (and basic common sense) cited in Plaintiffs - Appellants opening brief and in the pleadings to the District Court, this trio of Justice Department lawyers made the following absurd statement (Reply Brief page 8, line 12): "A tax liability arises, as a matter of law, as a consequence of realizing income over the course of a particular tax year." Since "The general term 'income' is not defined in the Internal Revenue Code" *United States v. Ballard* 535 F2d 400 - how could Plaintiffs become legally "liable" to pay a tax "as a matter of law" on something that the Code itself does not even define? [13] In addition, while claiming that an income tax "liability" arises as "a matter of law" these Justice Department lawyers ***never identified***

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[13] This Court can not claim that Code Section 61 defines "Gross Income," since it does so by saying that "Gross income means all income...." Since the word "income" is not defined in the Code, "gross income" is not defined either? As every 8th grader is taught "You can't define a word using the same word in the definition." Since Congress can not define "income, " because "it cannot by legislation alter the Constitution" (as stated in *Eisner v. Macomber*, 252 US 189 at page 206), it sought to hoodwink the American public into believing that it had defined "Gross Income" - and with the help of its praetorian courts, it succeeded. The fact that the Supreme Court in numerous earlier (but still binding) decisions held that the word "income" as used in our tax statutes means a corporate profit was extensively supported in footnote 1, page 5 of Exhibit D as submitted with Plaintiffs-Appellants' original. Opening Brief.

the Code Section that establishes such "liability" as a matter of law, as, for example, Code Sections 4401, 5005 and 5703 do with respect to wagering, alcohol and tobacco taxes? Plaintiffs-Appellants have attached as Exhibit A an excerpt from the Index of the IR Code published by the Research Institute of America. I would ask the Court to take judicial notice that the subdivision entitled "Liability for Tax" lists some 40 Federal taxes, but an "income" tax is not included. Why? A letter sent by Congressman Dan Burton to one of his constituents (Exhibit B) explains why such a reference is missing. "You are correct" says Congressman Burton, "that the word 'liable' or the terminology 'liability for income taxes' is not included in any section of the Internal Revenue Code." Therefore the Government's claim that a nonexistent income tax *liability* " arises as a matter of law" ***is a blatant lie*** (amounting to obstruction of justice) and explains why the Government never identified the Code Section where that "liability" supposedly "arises."

In addition, what statute ***puts the American public on notice*** that an income tax liability "arises as a matter of law"? Is there a Treasury Department regulation which provides for this? If so, Plaintiff-Appellants would expect that this Court *would identify any such regulation* if it adopts the Government's claim

And if such a liability "arises as a matter of law" why would Code section 6001 provide in relevant part that:

> Whenever in the judgment of the Secretary it is necessary, he may require any person, *by* ***notice*** *served upon such person or* ***by***

> ***regulation***, to make such returns, render such statements, or keep such records, as the Secretary deems sufficient to show whether or not such person is liable for tax under this title.

If an income tax "arises as a matter of law" why would there be a statute requiring the Secretary to either serve a notice "upon such person" or write a regulation showing "whether such person is liable for tax under this title." According to Defendant, section 6001 is meaningless because - according to the Defendant's Reply Brief - an income tax liability "arises as a matter of law" irrespective of "notices" or "regulations." In the instant case, since plaintiff-appellants have never been "served" with any such "notice," and since they have never found a *legislative* regulation (i.e. a regulation having the force and effect of law) requiring them to file, on what basis did their income tax liability "arise as a matter of law"?

And if an income tax liability "arises as a matter of law," why would the Supreme Court have stated in *Bull v. U.S.* 295 US 247, 24 that:

> Once the tax is assessed, the taxpayer will owe the sovereign the amount when the date fixed by law for payment arrives.

And if assessments count for nothing[14] why would the Supreme Court have stated in *Flora v. United States*, 362 US 145 at page 176 that:

> Our system of taxation is based upon voluntary ***assessment*** and payment, not upon distraint. (Emphasis added)

Apparently the Supreme Court got it all wrong. Jus-

tice Department lawyers should have informed them that an income tax *liability* "arises as a matter of law" and that "assessments" have nothing to do with it.

And, of course, according to the Government, Treasury Regulation 601.103 makes no sense at all, since it says:

> The Federal tax system is basically one of ***self- assessment***. In general each taxpayer . . .is required to file a prescribed form or return which shows the facts upon which tax liability may be determined and ***assessed***. (Emphasis added)

The Justice Department should inform the Treasury Department that this regulation is unnecessary because assessments (self or otherwise) have nothing to do with owing income taxes, because the "liability" for income taxes "arises as a matter of law"

As plaintiffs-appellants pointed out in their Opening Brief (Exhibit B), even an IRS' procedure manual provides as follows:

> The assessment Certificate must be signed by the Assessment Officer and dated. **The Assessment Certificate is the *legal document* that permits collection activity**. (Emphasis added)

Therefore, according to the IRS itself, an assessment certificate is the "legal document that permits collection activity" But if an income tax liability

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[14] If assessments account for something - just exactly what do they account for? Why do our laws provide form them at all?

"arises as a matter of law" then, logically the IRS can begin its "collection activity" *whenever* that "liability" arises - whether "assessment certificates" exist or not. The Justice Department should inform the IRS of this? Having to needlessly wait for "assessment certificates" must cost the Government money. Therefore if this Court adopts the Government's position that an income tax liability "arises as a matter of law" it will also be holding that "assessment certificates" are unnecessary. Hopefully this Ninth Circuit position will not cause too much confusion amongst the other circuits.

How did the Justice Department lawyers arrive at the novel conclusion that assessments don't count and that the Government is entitled to keep the funds at issue absent any assessment - self-assessment or otherwise. Well they claim that they relied on the following cases: *Manning v. Seeley Tube & Box Co.* 338 US 561; *Zeir v. US,* 80 F.3d 1360; *Moran v. US.* 63F3d 663; *Laing v. US*, 423 US 161; *Crompton & Knowles Loom Works v. White* 65 F.2d 132; *Ewing v. US* 914 F. 499; *Dye v. US*, 121 F.3d 1399; *Fisher v. United States*, 80 F.3d 1576; and *Loftin & Wood, Inc. v US*, 577F.2d 1206

Plaintiffs-Appellants will not waste their time analyzing these cases since - as the statutes (as shown below) make clear, these decisions are ***all irrelevant***. Beside, if any judge ever ruled that funds such as those at issue can be kept by the government absent any assessment or a court determination, then any such judge would not be a judge at all, but merely a charlatan. However, in listing these cases the government quotes Zeir *v. US*, supra, as holding that "While an assessment is thus a perquisite to (and sets limits on) certain kinds of administrative collection

activity...the United States is authorized to collect a tax without assessment by simply accepting a payment to satisfy a **proposed** or **agreed liability** where **forcible collection** is not necessary." Apart from this observation from *Zeir stating* the obvious, it also clearly establishes plaintiffs' case.

Obviously, the IRS is "authorized to collect a tax without assessment" when taxpayers *voluntary* make such payments. What is surprising about that? But this hardly means that the IRS *can compel* payments when no assessment or court determinations exist? Nothing in this quote from *Zeir* even suggests any such thing: yet this is the case here. In addition, *Zeir refers* to "a proposed or agreed liability where forcible collection is not necessary." None of these elements exist in the instant case.

First of all, the funds at issue were not paid "voluntarily." American workers are made to believe that if they do not agree to have taxes taken from their pay (and sign W-4's under penalty of perjury) they will go to jail. Indeed, many of them have gone to jail for (correctly) claiming "exempt" on their W-4s, because praetorian judges and prosecutors have ruled that such a legitimate claim constituted an **affirmative act of tax evasion.**

Secondly, the funds at issue were not paid pursuant to an "**agreed** liability." Plaintiffs contend that there is no such thing as an income tax "liability" ***as a matter of law***. And even if there were, plaintiffs would still have no income tax "liability" as a matter of fact.

In addition, as of the date that Plaintiffs filed their claim for refund, no agency of Government had

even "proposed" a liability. So, obviously, there was no "agreed" or "proposed" liability in the instant case that fell within the criteria enumerated in *Zeir?*

In addition, the funds at issue are being "forcibly" collected. Plaintiffs were misled and intimidated - on a variety of grounds - into allowing the funds at issue to be withheld from their pay and sent to the Government. When they discovered the truth, they demanded a refund, which the Defendant has refused to issue. Therefore, the funds at issue have been "forcibly collected" on this ground as well. Therefore, none of the elements of the instant case fall within the criteria outlined in *Zeir.*

So rather than *Zeir* supporting the Government's position, it is clear that *Zeir - for all of the above reasons* - ***SUPPORTS THE PLAINTIFFS' POSITION.*** Therefore, based on *Zeir* alone, it is pointless to analyze any of the other cases cited by the Government since, as in the case of Zeir, none of them can be any more supportive of the Government's position then was *Zeir.* Besides - ***falsus in uno falsus in omnibus.***

Incredibly, the Government's footnote on page 10 of its Reply Brief further establishes plaintiffs' case. (Prompting plaintiffs to ask, "Does the Government understand its own pleadings?"), since it correctly states that a law suit is necessary "to collect a tax 'without assessment.'" This was actually covered and asserted in plaintiffs' Opening Brief (pages 8 & 9). Since neither of these conditions are present in the instant case, the Government has no lawful basis to keep the funds at issue - ***as confirmed in the Government's own brief.***

IN ADDITION, NONE OF THE COURT DECI-

SIONS CITED BY THE GOVERNMENT ARE BINDING ON PLAINTIFFS-APPELLANTS

For the following reasons, none of the cases cited by the Government can be binding on plaintiffs-appellants anyway. The Privacy Act Notice in a 1040 booklet (Exhibit E in plaintiffs-appellants Opening Brief) specifically directs the public to Code Sections 6001, 6011, 6012 **and to none other.** So we must assume that the Government, in this manner, puts *the public on notice* as to what laws they must obey in matters involving income taxes - since these are the only statutes to which the public is directed. I would ask the Court to take judicial notice that both Code sections 6011 and 6011 notify the public that they need only comply with regulations. These statutes do so in the following manner.

Code Section 6001 says, in relevant part that:

Every person liable for any tax imposed by this title...shall...***comply with such rules and regulations*** as the Secretary may from time to time prescribe. (emphasis added)

Code Section 6011 says, in relevant part:

When required ***by regulations*** proscribed by the Secretary any person etc. etc. etc.

Therefore, this Court must take judicial notice that the U.S. Congress in both statutes, 6001 and 6011, put the public on notice that they need only comply with "regulations." Nothing in Sections 6001 and 6011 informs the public that they must obey statutes - ***or court decisions*** involving litigation in which they took no part . In other words, the only thing

that Congress requires the American public to obey in connection with income taxes are Treasury Department regulations. **And there is no *legislative* regulation that requires plaintiffs-appellants to pay income taxes, let alone the wage tax at issue**.

So the assumption by defendant that plaintiffs-appellants are bound by all those court decisions cited in its Reply Brief (litigation in which plaintiff-appellants took no part) is total nonsense. ***The U.S. Congress never passed a law binding Americans to litigation in which they took no part and were not a party to*** If Congress never passed such a law, how can plaintiffs be bound by all the court decisions cited by the Government? Indeed, if the American public were bound by such court decisions, the American public could never know what the law is unless they spent countless hours in law libraries looking up hundreds of court decisions many of which are in conflict with each other.[15] Therefore such a claim is nonsensical on its face.

So while the public is only bound by Treasury Department regulations, the ***Defendant has not cited one legislative regulation*** that would require plaintiffs -appellant to pay income taxes, let alone allow the Government to keep the funds at issue.

What the Defendant has sought to do in the instant case, is attempt to treat the opinions of judges as the equivalent of statutes passed by Congress - overlooking entirely that the public is only obliged to comply with regulations. In seeking to elevate judi-

[15] While such a situation, obviously, makes no sense whatsoever, it certainly will increase the cost of litigation and make more money for lawyers; which, of course, is the primary objective of America's legal system.

cial opinion to the status of "law" which plaintiffs-appellants are supposedly obliged to obey - the Justice Department was apparently unimpressed by the words of John Marshall as reproduced on page 16 of Exhibit D of plaintiffs' Opening Brief. Therefore it bears repeating here, and plaintiffs ask this Court to take judicial notice of the words of John Marshall explaining that courts are "the mere instruments of the law" and not the "law" itself.

> Judicial power, as contradistinguished from the power of the laws has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise discretion, it is a mere legal discretion, a discretion to be exercised *in discerning the course prescribed by law*; and, when that is discerned, *it is the duty of the court to follow it.* Judicial power is never exercised for the purpose of giving effect to the will of the judge, always for the purpose of giving effect to the will of the legislature; or, in other words, the **will of the law** (emphasis added)[16] ***Osborn et al v. The Bank of U.S.***, 6 L Ed. 204

In this case, the " will of the law" is clear - as shown by the following statutes passed by Congress. The "law," therefore, does not consist of the biased and often conflicting opinions of judges (as reflected in the court decisions cited in the Government's Reply Brief) but is contained in the following, representative statutes - all of which have been ignored by the

[16] In addition, Article 1, Section 1 of the United States Constitution provides that "All legislative Powers shall be vested in Congress." Thus the expression "case law" implying that judges can make law, independent of Congress to which the public must conform certainly finds no support in the Constitution, as John Marshall obviously understood.

Government in its Reply Brief - and in the underlying decision.

Section 6201, for example, clearly states, in relevant part, "The Secretary is authorized and ***required*** to make ...assessments of all taxes ...imposed by this title. (Emphasis added)." Is the Government suggesting that this statute is without force and effect and the Secretary **is not "required"** to make the assessments called for by this statute – or that the legal implication to the public is the same whether tax assessments exist or not? Apparently, according to the Government - and to District Court Judge Philip M. Pro - it makes no difference whether the Secretary follows the law or not? What purpose, therefore, does Section 6201 serve? A simply reading of the law and common sense tells us that until an assessment is made – no taxes can be owed. How else can this statute be read? If taxes can be owed absent assessments – then what purpose do assessments serve, and why do we bother providing for them at all?

Section 6203 further provides that "Upon request of the taxpayer, the Secretary shall furnish the taxpayer a copy of the record of the assessment." If taxpayers can owe income taxes absent assessments, why would "taxpayers" bother to get a "copy of the record of assessment" from the Secretary? What would it tell him? How much they owed? But if they owed the same amount absent assessments, why bother to get "a copy of the record of assessment"? Presumably if plaintiffs-appellants wrote to the Secretary pursuant to Code Section 6203 they would be told that they haven't been assessed for any 1996 income taxes for that year. What possible meaning would that information convey? That they owe taxes for 1996 anyway? If so, how much do they owe? And

who determined it, and when? If this Court will advise plaintiffs-appellants

1. How much in 1996 income taxes they owe?

2. When that liability was determined? And,

3. Who determined it?

Plaintiffs will be happy to pay that amount – as long as the Court also provides them with a copy of the delegation of authority of the person who determined their 1996 income tax liability, along with the *legislative* regulation that requires them to pay that amount.

Further Section 6303 provides, in relevant part that "the Secretary shall, as soon as practicable, and within 60 days, after the making of an assessment of a tax pursuant to section 6203, give notice to each person liable for the unpaid tax, stating the amount and demanding payment...." However, since according to the Government taxes can be owed absent assessments, the Secretary can presumable demand payment at any time – whether assessments exist or not and regardless of the provisions of this statute. If taxes can be owed absent assessments as argued by the Government – why can't the Secretary demand payment at any time, whether assessments exist or not?

If taxes can be owed absent assessments, does this not mean that the IRS can seize property and impose tax liens even though no assessments exist? If income taxes can be owed absent assessments as the Government (and Trial Court) suggest, why can't

the IRS seize property and impose liens absent assessments? Presumably, therefore, even though there are statutes to the contrary, the IRS is free – according to the Government and the Trial Court - to seize property without bothering: to make termination assessments as required by Code Sections 6851(a) and 6852(a)(1)(B); or jeopardy assessments as required by Code Sections 6861(a) and 6862(a); and can impose liens absent assessments even though Code Section 6322 states that "the lien ...shall arise at the time the *assessment* is made."

And, of course, Code Section 6204 provides for the making of "a supplement ***assessment*** whenever it is ascertained that any ***assessment*** is imperfect or incomplete..." If assessments don't count, as the Trial Court and the Government now claim, why is it important that they be corrected if they are "imperfect or incomplete"? If assessments count for nothing, what difference does it make if they are "imperfect" or "incomplete."?

In addition Code Section 6213(c) provides that "If the taxpayer does not file a petition with the Tax Court within the time proscribed.... The deficiency.... shall be ***assessed,*** and shall be paid upon notice and demand..." while Section 6214 provides that the Tax Court can redetermine an amount greater than the deficiency and that the additional amount "should be ***assessed*** if claim therefor is asserted by the Secretary..." In addition, Code Section 6215 provides that "If the taxpayer files a petition with the Tax Court, the entire amount redetermined as the deficiency by the decision of the Tax Court...shall be ***assessed*** and shall be paid upon notice of demand...." If assessments count for nothing as the trial court and the Government claim, why would not the simple deci-

sion of the Tax Court be enough to require payment of the deficiency? Why does the law require that even a Tax Court's "redetermination" has to be "assessed" before it needs to be "paid."? If someone wins a civil law suit does the amount awarded have to be "assessed" before the prevailing party is entitled to collect the award? The answer, of course, is no. It is therefore clear that ***for tax purposes***, there must ***be an assessment***, even after the Government wins in Tax Court. If taxpayers are not even required to pay a Tax Court determination until after that amount is "assessed," how can the Trial Court and the Government claim that Plaintiffs are required to pay an income tax (i.e. the Government can legally keep the $5,035 at issue as payment for 1996 income taxes) absent either a Tax Court determination or an assessment?

Therefore, in ruling that income taxes can be owed absent assessments the Trial Court and the Government in its Reply brief have tossed into the trash can the above 11 statutes and at least 30 others while seeking to replace them with the irrelevant and jaundiced opinions of judges who may have as little regard for the law and the Constitution as does Judge Philip W. Pro, the trial judge in this case, and the Justice Department lawyers who prepared the Government's Reply Brief.

WITH RESPECT TO CODE SECTION 6151

Plaintiffs have already explained in detail why Code Section 6151 can have no bearing on any requirement to pay income taxes. For one thing, there is no mention of Section 6151 in the Privacy Act Notice of a 1040 - so how would the public *even know* about Code Section 6151(which is not even contained

in subtitle A [17]) let alone that it requires them to pay income taxes without assessments? In addition, the implementing regulation for this statute - as plaintiffs have already pointed out in their Opening Brief - is shown in the Parallel Table of Authorities to be in 27 CFR and not in 26 CFR. And while CFR 26 does show a regulation for 6151, there is no mention about income taxes in that regulation, and **no authority** is shown to support the regulation. [18] Thus the statute and its regulation are totally benign with respect to income taxes, and the Defendant in its Reply Brief does not attempt to refute these facts in any definitive way. Defendant merely makes the naked and unsupported statement that "Section 6151, by its plain terms, relates to any taxes imposed under the Internal Revenue Code. " Says who? The Government does not even address the issue of the lack of an implementing regulation for this statute, nor attempt to refute plaintiffs' argument on this issue. And as plaintiffs have mentioned before, Code Section 6001 and 6011 put the public on notice that they need only ***comply with regulations*** - so what is the regulation that plaintiffs have to comply with in connection with Code section 6151?

Suffice it to say that if any Ninth Circuit panel were ever to rule that Code Section 6151 - just on its own - mandates the payment of income taxes without assessments and without any *legislative*, implementing regulation, that panel will go down in infamy and nothing will be able to save their reputations. Such an egregious ruling will be reported and publicized far and wide and any judge who agrees

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[17] The suggestion that the public has to sift through 1,500 Code Sections trying to find those that apply to them and to the paying of income tax ***is itself ludicrous***. How can any federal judge fail to see this?

[18] Obviously, a regulation that doesn't even claim to implement *any* statute passed by Congress - is without force and effect.

with such a spurious proposition will never live it down. His reputation and credibility will *forever* be suspect and stained.

WITH RESPECT TO CODE SECTION 3402(A)(1)

The Government's statement in its Reply Brief that: "Section 3402 entitled 'Income taxes Collected at Source' does not impose a tax" – is, of course, an out and out lie. As plaintiffs pointed out in their Opening Brief, Code Section 6413 specifically states that a tax is "imposed by section....3402." Therefore how can the Government claim that Code section 3402 "does not impose a tax"?

Further proof that a different tax (not an income tax) is imposed in Code section 3402 is the wording contained in Code Section 3402(d). It states, in relevant part, "thereafter the tax against which such tax may be credited...." Obviously Code Section 3402(d) is describing ***two different taxes***. The tax imposed by Section 3402(a)(1) and the one "against which such tax may be credited" - which is the income tax imposed in Code Section 1.

In order to pretend that it had contested and refuted plaintiffs claim that the taxes at issue are an unconstitutional, unapportioned direct tax on wages, the Defendant states that Section 3402 "merely prescribes a mechanism by which *tax* is collected from wages of employees," and that Section 3402 "provides that 'every employer making payment of wages shall deduct and withhold upon such wages' certain *taxes*." Notice that in both statements the Defendant ***carefully*** and ***deliberately*** avoided using the words "income taxes" to describe the taxes being withheld in Code section 3402(a)(1). Obviously, the Defendant did so because it knew full well that the tax being

withheld pursuant to Code Section 3402(a)(1) was a ***wage*** tax and not an ***income*** tax, and so sought, in this manner, to avoid having to make an ***obvious false statement*** in connection with the kind of taxes being described in Code section 3402(a)(1). Hopefully this Court will not attempt to get away with this kind of subterfuge.

OTHER FALSE CLAIMS IN DEFENDANT'S REPLY BRIEF

The payment of income tax is not voluntary.

On page 12, line 10 the Government states "The payment of income tax is not voluntary," and cites as its authority *Wilcox v. Commissioner,* 848 F. 2d 1007. This, of course, is in conflict with the Supreme Court's observation in *Flora v. United States* 362 US 145, 176 that "Our system of taxation is based upon voluntary assessment and payment, not upon distraint" to say nothing of the IRS' own "Mission Statement" (see attached as Exhibit C) in which the IRS states that its mission is to "achieve the highest possible degree of *voluntary* compliance."

However, as plaintiffs have previously pointed out "Who cares what the judges in *Wilcox* said?" ***Whatever they say is not law.*** Why didn't the Government cite a **statute** or *legislative* **regulation** that mandates the payment of income tax? They didn't do so, because ***no such statute or regulation exists*** And this Court should understand that the Government (and the Courts) are *not going to fool the American public any longer with this kind of subterfuge.* Too many Americans now know the truth. [19] As Abraham Lincoln said. "You can fool some of the people all the time, and all of the people some of the time. But you can't fool all of the people all of the time." And grow-

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[19] As proof, merely visit "paynoincometax.com"

ing numbers of Americans are discovering the truth, and the Government is not going to get away with extorting this tax much longer. The end is near.

But apart from these obvious acknowledgments of the voluntary nature of the income tax, plaintiffs attach as Exhibit D pages 28 & 29 from the April 1998, " United States Attorneys' Bulletin" Note that under the caption **"Follow That Lead! Obtaining and Using Tax Information in a Non-Tax Case"** the Justice Department advises its attorneys how to use 1040 information to prosecute citizens in a variety of situations. The article points out that "(tax) return information can provide some of the most significant leads, corroborative evidence, cross-examination material obtainable from any source" and that it "can play an important role in criminal investigations of non-tax crimes." Is the Justice Department claiming that the Government can "require" Americans to provide this kind of information on income tax returns and then use the information against those who supply it? If their answer is "yes" - than the ***DECEIT AND CRIMINALITY OF JUSTICE DEPARTMENT LAWYERS SIMPLY KNOWS NO BOUNDS.***

With respect to the Government's claim that "the Supreme Court and the lower federal courts have both implicitly recognized that the Sixteenth Amendment's authorization of a non-apportioned direct income tax on United States citizens residing in the United States and thus the validity of the federal income tax as applied to citizens" (Defendant's Reply Brief, page 12, lines 5-9) is a misstatement of the facts -irrespective of who this quote is attributed to. First of all, what "lower federal courts" have to say about the 16th Amendment is immaterial, since the Supreme Court has already spoken about the 16th Amendment

in no uncertain terms. However, "lower federal courts" generally ignore or misstate those "terms;" so let us put those "terms" in their proper light.

First of all the Government's claim as stated above that the Supreme Court "implicitly recognized that the Sixteenth Amendment" authorized a "non-apportioned direct income tax" is nonsense. The bedrock, Supreme Court case on this is *Brushaber v. Union Pacific RR.* 240 US 1. This was the decision that upheld the constitutionality of the income tax provisions of the Tariff Act of October 3, 1913. In so doing the Court held that:

1. The 16th Amendment conferred no new taxing powers on the Government.
2. The 1895 *Pollock* decision 157 US 429 that held the income tax of 1894 unconstitutional, was not overturned by the Amendment.[20] And income taxes imposed on sources of income (as contrasted to a tax on incomes separated from those sources (i.e. corporate profits)) still were subject to the rule of apportionment.

1. The Government always had the power to tax income, so this power was not conferred upon it by the 16th Amendment, and
2. The purpose of the Amendment was to prevent an income tax from being ***taken*** from the class of taxes to which it *inherently belonged* (which the *Brushaber* Court held were

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[20] If the Court will Sheperdize the Pollock decision, it will see that, that 1895 decision has not been reversed or overturned and so it is still binding on this Court today. But what is more binding on the Court is the provisions of Code Section 61- which, in seeking to define income, does so in a manner that only corporate profit falls within that meaning.

> ***excise*** taxes) and ***being placed*** in a class to which ***they didn't belong*** - which was the class of ***direct*** taxes, as held by the Supreme Court in *Pollock*. The actual words used by the Court in *Brushaber* (at pages 16 & 17) were that "taxation on income was in its nature an ***excise*** entitled to be enforced as such." (Emphasis added)

So *the Brushaber* court ruled that the "**whole purpose**" of the 16th Amendment was to allow the Government to tax "income" in the form of an ***excise tax*** (subject only to the rule of uniformity), and to prevent it from being held to be a direct tax (as held by the *Pollock* Court) subject to the rule of apportionment. But in order for an income tax to be treated as the **excise tax** the *Brushaber* Court ***ruled it to be***, it has to be imposed *as an* ***excise*** **tax** Obviously, ***it can not be an excise tax in name only!*** It can not be imposed as a direct tax on **sources of income**, such as: wages, dividends, interest, rent, etc. etc. etc. As the *Brushaber* Court held clearly and unequivocally held:

> ...the whole purpose of the Amendment was to relieve all income taxes when imposed from apportionment from a ***consideration of the source*** whence the income was derived.
> (at page 17, emphasis added)

With regard to the false claim generally advanced by current federal courts and as is advanced by the Government's Reply Brief, that the 16th Amendment gave the Government the power to levy a direct tax on sources of income (such as wages, dividends, etc. etc. etc.) the Court said, at pages 18 & 19...

> The contention that the Amendment treats a tax on income as a **direct** tax although *relieved from apportionment* and is necessarily therefore *not subject to the* ***rule of uniformity*** as such rule applies to taxes which **are *not* direct**, thus *destroying* the **two great classifications** which have been recognized and enforced from the beginning, ***is wholly without foundation***. . Indeed from another point of view, the Amendment demonstrates that ***no such purpose was intended*** and on the contrary shows that it was drawn with the object of maintaining the ***limitations of the Constitution*** and *harmonizing* their operation. (Emphasis added throughout)

Thus the Supreme Court ruled in *Brushaber* that the ***taxing clauses of the Constitution were not the least bit changed by the 16th Amendment*** - as the Government's Reply Brief would have us believe. Direct taxes are still subject to the rule of apportionment (as held in *Pollock*) while all indirect, excise taxes - such as a tax on income (when separated from its sources) is still subject to the rule of uniformity - and as is fully proven and set forth in plaintiffs' Reply Brief, the income tax is being enforced **neither pursuant to the rule of uniformity or the rule of apportionment.**

All of the above is confirmed in the following excerpt from *Stanton v. Baltic Mining Co.*, 240 U.S. 103(1915), in which the Supreme Court stated at page 112.

> "...the provisions of the Sixteenth

> Amendment ***conferred no new power of taxation*** but simply prohibited the previous complete and plenary power of income taxation possessed by Congress from the beginning from being taken out of the category of **indirect taxation** to which *it inherently belonged* and being placed in the category of **direct taxation** subject to apportionment. (Emphasis added)

All of the above is further confirmed by the "CRS Report for Congress" prepared by John R. Luckey, Legislative Attorney, American Law Division and dated December 5, 1996 - and plaintiffs have attached as Exhibit E pages 4 & 5 of that Report. Note that the Report states that:

> .... the Sixteenth Amendment did not ***authorize any new type of tax***, not did it repeal or revoke ***the tax clauses of Article I of the Constitution***, quoted above. **Direct taxes** were, notwithstanding the advent of the Sixteenth Amendment, still *subject to the rule of* **apportionment** and ***indirect*** *taxes were still subject to the rule of* ***uniformity.*** (Emphasis added)

Mr. Luckey further noted that "The Court noted that the inherent character of an income tax was that of an indirect (excise) tax. And in a caption on page 5 he writes, **"WHAT DOES THE COURT MEAN WHEN IT STATES THAT THE INCOME TAX IS IN THE NATURE OF AN EXCISE TAX?"** He then explains that "An excise tax is a tax levied on the manufacture, sale, or consumption of a commodity or any various taxes on privileges often assessed in the form of a license or fee" Obviously, the income tax is not

imposed in this manner, so obviously the current income tax is not imposed in conformity with the 16th Amendment.

WHAT DOES THIS ALL MEAN?

It means that the income tax is not being enforced pursuant to the 16th Amendment or the taxing clauses of the Constitution. Does this mean that the income tax is imposed unconstitutionally? No -since the laws as passed by Congress do not make the payment of income taxes mandatory. What it means is that the tax is being **enforced unconstitutionally** by Justice Department lawyers and Federal judges who obviously have little regard for either the laws as passed by Congress or the Constitution of the United States. It means that that for years federal courts have been enforcing the income tax in violation of the taxing clauses of the Constitution - since the income tax is not being enforced either pursuant to the rule of apportionment or the rule of uniformity - as covered in both *Brushaber, Stanton,* and as is fully set forth in plaintiffs' Opening Brief. It further means that the funds at issue being a direct tax on plaintiffs wages (as opposed to it being a tax on income separated from its sources) - is totally unconstitutional if their payment is made mandatory. What saves the wage tax imposed in Section 3402(a)(1) from being unconstitutional - as explained in plaintiffs' opening brief - is the ability of those upon whom it is imposed to get such taxes refunded to them by asking for it, as plaintiffs have done. The law and the Constitution are so overwhelmingly on the side of the plaintiffs in this action, that no objective tribunal could fail to see it - as the American public will obviously also recognize.

THEREFORE BASED ON ALL OF THE ABOVE,

plaintiffs-appellants requests that this Honorable Court reverse the outrageous decision of Judge Philip M Pro of January 21, 1999 in which he awarded a summary judgment to the United States, and grant instead plaintiff's request for a summary judgment and a refund of the funds at issue. If the Ninth Circuit fails to do this, than it will lose far more from such failure than will the plaintiffs-appellants.

Respectfully submitted

Robert and Elena Brown